

1980

Workers' Compensation: The Dual-Capacity Doctrine

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Recommended Citation

(1980) "Workers' Compensation: The Dual-Capacity Doctrine," *William Mitchell Law Review*: Vol. 6: Iss. 3, Article 8.
Available at: <http://open.mitchellhamline.edu/wmlr/vol6/iss3/8>

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WORKERS' COMPENSATION: THE DUAL-CAPACITY DOCTRINE

Under workers' compensation statutes, an employee generally is barred from suing his employer. The dual-capacity doctrine, however, allows an employee to sue his employer if that employer occupies a capacity with duties and obligations that are independent of the employee-employer relationship. To date, the Minnesota Supreme Court has not considered the dual-capacity doctrine. Employees have asserted eight capacities that may establish an independent duty. This Note will examine each of those capacities and make specific recommendations on whether Minnesota should adopt the dual-capacity doctrine.

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I. INTRODUCTION

"The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee" MINN. STAT. § 176.031 (1978).

The exclusive-remedy provision of a workers' compensation act generally is a bar to all tort actions by an employee against an employer.¹ Under workers' compensation statutes, the employee has sacrificed the

1. See Note, *Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553, 556-57 (1979); Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L.J. 818, 818-19 (1974).

sometimes uncertain common-law remedy for employment-related injuries in return for the almost certain recovery of workers' compensation benefits regardless of employer fault.² As with virtually all other jurisdictions,³ Minnesota has an exclusive-remedy provision in its Workers' Compensation Act.⁴

In recent years, however, several jurisdictions have developed a common-law exception to the exclusive-remedy provision.⁵ A number of authorities have labeled this theory the "dual-capacity doctrine."⁶ According to Professor Larson, under the dual-capacity doctrine:

[A]n employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.

. . . .

The decisive dual-capacity test is not concerned with how separate or different the second function of the employer is from the first but with whether the second function generates obligations unrelated to those flowing from the first, that of employer.⁷

Twenty-seven jurisdictions have addressed the principles underlying the dual-capacity doctrine.⁸ The emergence of the dual-capacity doctrine has caused a reevaluation of the principles underlying workers' compensation legislation.⁹

The primary purpose of workers' compensation legislation is to benefit an employee by allowing the recovery of minimum benefits for work-related injuries without a showing of employer fault.¹⁰ In addition, such legislation provides an employee with a relatively speedy remedy without

2. See note 1 *supra*.

3. See 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, §§ 65.00-.10, at 12-1 to -3 (1976 & Cum. Supp. 1980).

4. See MINN. STAT. § 176.031 (1978).

5. See notes 8-9 *infra* and accompanying text. See generally 2A A. LARSON, *supra* note 3, § 72.80.

6. See 2A A. LARSON, *supra* note 3, § 72.80; Note, *supra* note 1, at 553-55; Comment, *supra* note 1, at 821-24. Cases involving the dual-capacity doctrine should be distinguished from those holding that the injury did not arise out of or in the course of employment and from those holding that the defendant was an entity separate from the employer. See Comment, *supra*, at 559-60. But see *Lewis v. Gardner Eng'r Corp.*, 254 Ark. 17, 491 S.W.2d 778 (1973) (joint venture held not to be separate legal entity from the parties of which it was comprised).

7. 2A A. LARSON, *supra* note 3, § 72.80, at 14-112, 14-117.

8. These jurisdictions are: Alabama, Alaska, Arizona, Arkansas, California, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Tennessee, Washington, and Wisconsin.

9. See Note, *supra* note 1, at 553.

10. See *id.* at 556.

protracted and often unsuccessful litigation.¹¹ With increasing frequency, however, employees have found that the exclusive-remedy provision effectively shields employers against the full economic liability that the common law would have imposed.¹²

Application of the dual-capacity doctrine depends upon the finding of duties and obligations that arise outside of the employment relationship. To be liable, an employer must act in a capacity other than that of an employer.¹³ By suing the employer based upon a legal relationship distinct from the employer-employee relationship, the exclusive-remedy provision is avoided in jurisdictions that accept the doctrine. To justify a common-law action against an employer, injured employees have asserted that the employer acted in one or more of the following eight capacities:

- 1) Manufacturer or distributor of a defective product
- 2) Provider of medical services
- 3) Insurer
- 4) Corporate subdivision or related corporation
- 5) Government subdivision
- 6) Owner of real estate

11. See *id.* at 556-57. One author estimated that prior to the workers' compensation acts 80% of all common-law actions by employees were unsuccessful. *Id.* (citing B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 1.2, at 3 (1950)).

12. See Note, *supra* note 1, at 553-54. See generally Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. INDUS. & COM. L. REV. 555 (1963).

Professor Larson has distinguished the recoveries available under common-law tort actions and workers' compensation statutes. Under workers' compensation statutes, damages for pain and suffering and loss of consortium are not recoverable, even though these damages may be a substantial portion of a tort recovery. 1 A. LARSON, *supra* note 3, § 2.40 (1978 & Cum. Supp. 1980). Professor Larson states that "It was never intended that [workers'] compensation payments should equal actual loss, for the reason, if no other, that such a scale would encourage malingering." *Id.* § 2.50, at 12. Furthermore, Professor Larson asserts that compensation ceilings result in substantial undercompensation of higher-paid employees. *Id.* Professor Larson has observed that "the amount of compensation awarded may be expected to go not much higher than is necessary to keep the worker from destitution. That is indeed so." *Id.* at 11.

13. The United States Supreme Court in *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923), stated:

Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of wages and the other for the sake of profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured.

Id. at 423. The Ohio Supreme Court used this language as the basis for an analysis of the dual-capacity doctrine. *Guy v. Arthur H. Thomas Co.*, 55 Ohio St. 2d 183, 186, 378 N.E.2d 488, 490 (1978) (hospital employee allowed to bring suit under dual-capacity doctrine for failure of employer-hospital to diagnose mercury poisoning).

- 7) Vendor
- 8) Statutory duty not imposed by a workers' compensation act.

This Note will examine each of these capacities, the duties that arise under them, and the success of each in bringing about the acceptance of the dual-capacity doctrine.

II. ORIGIN OF THE DUAL-CAPACITY DOCTRINE

The 1952 California case of *Duprey v. Shane*¹⁴ is considered to be the first decision to have adopted the dual-capacity doctrine, even though the court did not expressly refer to the doctrine.¹⁵ In *Duprey* the plaintiff was a nurse who received injuries to her neck and body in the course of her employment. The plaintiff's employer, a chiropractor, treated the plaintiff's injury. As a result of the negligent administration of the treatment, the plaintiff experienced further disability. The plaintiff received workers' compensation benefits and brought a common-law action against her employer for the aggravated injuries.¹⁶

Defendant moved for dismissal on the ground that the court had no jurisdiction over a claim arising under the workers' compensation statute. The California Supreme Court rejected defendant's contention and held that the case was one that was against "a person other than an employer."¹⁷ The court stated that when a doctor-employer elects to

14. 109 Cal. App. 2d 586, 241 P.2d 78, *aff'd*, 39 Cal. 2d 781, 249 P.2d 8 (1952).

15. See Comment, *supra* note 1, at 822. Cases that arose prior to *Duprey* generally rejected any attempt by an employee to maintain a suit against the employer. See, e.g., *Walker v. City & County of San Francisco*, 97 Cal. App. 2d 901, 219 P.2d 487 (1950) (city fire department employee killed by city-owned and operated streetcar); *DeStefano v. Alpha Lunch Co.*, 308 Mass. 38, 30 N.E.2d 827 (1941) (restaurant employees' food poisoning); *Bross v. City of Detroit*, 262 Mich. 447, 247 N.W. 714 (1933) (city fire department employee injured by city-owned and operated streetcar); *Winter v. Peter Doelger Brewing Co.*, 175 A.D. 796, 162 N.Y.S. 469 (1916) (employee injured by employer-owned defective elevator that was primarily used in employer's other business), *aff'd mem.*, 226 N.Y. 581, 123 N.E. 895 (1919); *De Giuseppe v. City of New York*, 188 Misc. 897, 66 N.Y.S.2d 866 (Sup. Ct. 1946) (city sanitation department employee killed by city-owned and operated trolley car), *aff'd mem.*, 273 A.D. 1010, 79 N.Y.S.2d 163 (1948). But see *Volk v. City of New York*, 284 N.Y. 279, 30 N.E.2d 596 (1940) (common-law action by nurse against hospital for negligent treatment after becoming ill on duty held not barred by the workers' compensation statute).

Those jurisdictions that rejected the principles of the dual-capacity doctrine in early cases eventually reversed their positions and recognized the dual-capacity doctrine. See, e.g., *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977) (employee injured by defective scaffolding manufactured by employer); *Panagos v. North Detroit Gen. Hosp.*, 35 Mich. App. 554, 192 N.W.2d 542 (1971) (hospital employee cut mouth on food purchased in hospital cafeteria); *Stevens v. County of Nassau*, 56 A.D.2d 866, 392 N.Y.S.2d 332 (1977) (mem.) (hospital employee injured on hospital grounds and treated at hospital emergency room and orthopedic clinic).

16. 39 Cal. 2d at 784-89, 249 P.2d at 10-13.

17. *Id.* at 789-94, 249 P.2d at 13-16.

treat a work-related injury, the doctor-employer's responsibility is the same as that of any other doctor.¹⁸ According to the *Duprey* majority, to allow a professional such as a doctor to avoid such liability would encourage quackery.¹⁹

The *Duprey* court also rejected defendant's argument that a decision in the plaintiff's favor would have required a dual legal personality that the law is loath to impose on a party. The court stated that defendant had two relationships toward the plaintiff, that of employer and physician, and that the distinction was realistic, not legalistic.²⁰ Even though the *Duprey* court did not expressly use the phrase "dual-capacity doctrine," the principles of the doctrine were clearly delineated.²¹

In 1963 the United States Supreme Court addressed the principles underlying the dual-capacity doctrine in *Reed v. Yaka*.²² The plaintiff's employer, a stevedoring company, operated the steamship *Yaka* under a bareboat charter. Under such a charter, the full possession and control of the ship is conveyed to the charterer. Although plaintiff's employer was not the owner of the ship, under admiralty law a bareboat charterer is treated as the owner and is liable for the unseaworthiness of the vessel. While unloading the ship, the plaintiff was injured because of a defect in a pallet. Plaintiff obtained compensation under the Longshoreman's and Harbor Workers' Compensation Act²³ (Longshoreman's Act) and brought a common-law action against the employer for operating an unseaworthy ship.

The defendant asserted that the exclusive-remedy provision of the Longshoreman's Act, which is virtually identical to that found in workers' compensation acts,²⁴ barred the common-law action. The Court rejected the defendant's position, citing two previous Supreme Court cases that held a shipowner's obligation of seaworthiness to be nondelegable.²⁵ The Court pointed out that if the plaintiff had been employed by an independent stevedoring company, he could have recovered against the shipowner.²⁶ The majority reasoned that an employee's need for protection from unseaworthy ships is the same whether the longshoreman

18. *Id.* at 793, 249 P.2d at 15.

19. *Id.* at 791, 249 P.2d at 14.

20. *Id.* at 793, 249 P.2d at 15.

21. *Duprey* is still good law. See *Hoffman v. Rogers*, 22 Cal. App. 3d 655, 99 Cal. Rptr. 455 (1972) (action against company physician for malpractice in aggravation of employee's industrially-incurred injury upheld under *Duprey*).

22. 373 U.S. 410 (1963).

23. 33 U.S.C. §§ 901-941, 944-950 (1976 & Supp. II 1978).

24. The Longshoreman's Act provides that the liability of an employer "shall be exclusive and in place of all other liability of such employer to the employee . . ." 33 U.S.C. § 905(a) (1976).

25. 373 U.S. at 410-11, 413-16 (citing *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946)).

26. *Id.* at 414.

works for a stevedoring company or for the owner of a vessel, and all employees are entitled to like treatment under the law.²⁷ According to the majority, blind adherence to the Longshoreman's Act would result in a disregard of the employer's duty as a shipowner.²⁸ Subsequent federal cases indicate that *Reed* is still good law.²⁹

The following discussion consists of a state-by-state analysis of the dual-capacity doctrine in the context of each of the eight dual capacities. The continued validity and growth of the dual-capacity doctrine will be examined, along with the likelihood of Minnesota's adoption of the dual-capacity doctrine.

III. PARTICULAR CAPACITIES

A. *Manufacturer or Distributor of Defective Products*

In recent years, strict liability for defective products has gained almost nationwide acceptance.³⁰ Strict liability has emerged partly because the consumer, faced with increasingly complex products, is forced to rely on the manufacturer to supply reasonably safe goods.³¹ In addition, the manufacturer is considered to be better able to bear and spread the costs associated with defective products.³² Furthermore, strict liability is im-

27. *Id.* at 415.

28. The Court stated: "[O]nly blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that . . . [the] employer of [a] longshoreman . . . was also a bareboat charterer . . . charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid." *Id.*

29. *See* *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *In re Allied Towing Corp.*, 416 F. Supp. 1207 (E.D. Va. 1976); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402 (E.D. La. 1974). *But see* *Lucas v. "Brinkness" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974) (*dicta*). For a succinct discussion of the history behind the Longshoreman's Act, the case law interpreting it, and how subsequent amendments to the Longshoreman's Act have affected that case law, see *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977).

The relationship between state workers' compensation law and a federal unseaworthiness claim was explored in *Barber v. New England Fish Co.*, 510 P.2d 806 (Alaska 1973). In *Barber* the court held that a longshoreman who was injured in the course of employment and collected state workers' compensation benefits was not precluded from bringing an action for unseaworthiness. *Id.*

30. Strict liability for defective products was first adopted in California in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Since *Yuba* at least 38 jurisdictions have adopted strict tort liability for defective products. *See* 1 R. HURSH & H. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 4.41 (2d ed. 1974 & Cum. Supp. 1979). *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

Minnesota adopted the doctrine of strict liability in *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967) (child severely burned when room vaporizer tipped over).

31. *See* Prosser, *supra* note 30, at 799-800.

32. *Id.* In *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967),

posed on manufacturers to deter the production of defective goods.³³ Because the duty of a manufacturer to supply defect-free products arises independently of any employer-employee relationship, the issue arises whether employees should be allowed to bring a strict products liability action against employers.

1. *Adoption of the Doctrine*

Only three jurisdictions, California, Illinois, and Ohio, have expressly applied the dual-capacity doctrine to products liability actions. In *Douglas v. E. & J. Gallo Winery*,³⁴ the plaintiff brought a common-law action against his employer for the defective construction of a scaffold.³⁵ A California court of appeals held that the plaintiff could bring an action against the manufacturer even though the plaintiff's injuries arose out of and in the course of his employment.³⁶ The court, however, placed a restriction on the dual-capacity doctrine in a products liability suit: the product in question must be manufactured by the employer for sale to the general public and not merely for the sole use of the employer.³⁷

the Minnesota Supreme Court discussed some of the policy reasons for adopting strict liability:

[I]n our view, enlarging a manufacturer's liability to those injured by its products more adequately meets public policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions. In a case such as this, subjecting a manufacturer to liability without proof of negligence or privity of contract, as the rule intends, imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.

Id. at 338, 154 N.W.2d at 500.

33. See *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 113, 137 Cal. Rptr. 797, 803 (1977); Note, *supra* note 1, at 580-81; Comment, *supra* note 1, at 832 & n.76.

34. 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

35. *Id.* at 106, 137 Cal. Rptr. at 798.

36. *Id.* at 107, 137 Cal. Rptr. at 799.

The most recent California case to deal with the dual-capacity doctrine in a products liability context is *Dorado v. Knudsen Corp.*, — Cal. App. 3d —, 163 Cal. Rptr. 477 (1980) (defective plastic crates causing employee's injury sold to limited partnership employer by general and managing partner, remanded for further proceedings).

37. 69 Cal. App. 3d at 107, 137 Cal. Rptr. at 799. The principle in *Douglas* that the dual-capacity doctrine does not apply to an employer who manufactures a defective product that is not sold to the general public was foreshadowed in *Williams v. State Compensation Ins. Fund*, 50 Cal. App. 3d 116, 123 Cal. Rptr. 812 (1975) and *Shook v. Jacuzzi*, 59 Cal. App. 3d 978, 129 Cal. Rptr. 496 (1976). In *Williams* the defendant-employer allegedly designed and manufactured a defective spraying machine for use by its employees. The court barred the products liability suit against the employer for injuries arising out of the use of the spraying machine because the machines were manufactured solely for use by the employees, not for sale to the public. 50 Cal. App. 3d at 121, 123 Cal. Rptr. at 814. In *Shook* the court held that the exclusive-remedy provision barred an action by an employee injured by a machine that the employer designed and manufactured. 57 Cal. App. 3d at

The *Douglas* court viewed its holding as a logical application of *Duprey v. Shane*.³⁸ The court stated that when an employer is a manufacturer selling to the public, that employer assumes all of the duties and liabilities of a manufacturer. The mere fact that the injured party happens to be an employee is of no consequence; the obligations of a manufacturer are independent of the obligations of an employer.³⁹ According to the *Douglas* court, the workers' compensation laws were not intended to deprive an employee of the full protection of the law.⁴⁰

The court noted that because the workers' compensation laws were enacted before strict products liability actions were recognized, and because an employer can be indirectly liable to an employee through a series of indemnity actions, it would be grossly unfair to provide an employer-manufacturer with immunity from suit.⁴¹ According to the *Douglas* court, extending the dual-capacity doctrine to allow a strict products liability action against the employer did not controvert the policies underlying either the workers' compensation statute or strict products liability actions. Instead, the decision comported with those policies.⁴² Furthermore, the *Douglas* court rejected the notion that its decision might cripple the workers' compensation system; *Duprey* had produced no noticeable adverse effect in twenty-five years and *Douglas* was merely the logical extension of *Duprey*.⁴³

The second court to apply the dual-capacity doctrine in a products liability case was the Ohio Court of Appeals in *Mercer v. Uniroyal, Inc.*⁴⁴ In *Mercer* the plaintiff's services as a truck driver had been "leased" to the defendant Uniroyal. Uniroyal provided a vehicle that was leased from Avis and that coincidentally had Uniroyal tires. A defect in one of the front tires caused the tire to blow out, resulting in an accident that injured the plaintiff. Under Ohio law, the plaintiff was deemed to be the

980-82, 129 Cal. Rptr. at 497-98. Because the employer created the machine for its own use on its own plant and premises, the court stated that pursuant to § 402A, comment f of the *Restatement (Second) of Torts*, the employer was not subject to strict tort liability. *Id.* at 981, 129 Cal. Rptr. at 498. The court also stated that "[a]ttempts to extend the rule of *Duprey* have been repeatedly rejected" *Id.* at 980, 129 Cal. Rptr. at 497-98. A Minnesota district court adopted the *Douglas* rule in *Netherland v. Acme Tag Co.*, No. 753534 (Minn. 4th Dist. Ct. Apr. 13, 1979). For a discussion of *Netherland*, see notes 93-96 *infra* and accompanying text.

38. 39 Cal. 2d 781, 249 P.2d 8 (1952). For a full discussion of *Duprey*, see notes 14-21 *supra* and accompanying text.

39. 69 Cal. App. 3d at 107-08, 137 Cal. Rptr. at 799.

40. *Id.* at 112, 137 Cal. Rptr. at 802.

41. *Id.*

42. *Id.* at 112-13, 137 Cal. Rptr. at 803.

43. *Id.* at 113, 137 Cal. Rptr. at 803; *accord* *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 798, 354 N.E.2d 553, 562 (1976) (Simon, J., dissenting).

44. 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

employee of the defendant Uniroyal.⁴⁵ In this case of first impression, the Ohio court held that the exclusive-remedy provision of the Ohio Worker's Compensation Act did not bar the plaintiff's products liability action.⁴⁶ The court stated that the tire's having been manufactured by the defendant would not prevent recovery because the hazard was not necessarily one of employment, but was common to the public in general.⁴⁷ Furthermore, because the statute failed to recognize the unique problems raised by defective products in the work place, and because the statute also failed specifically to eliminate a products liability cause of action, the *Mercer* court refused to bar plaintiff's product liability action.⁴⁸

The dissent in *Mercer* argued that the dual-capacity doctrine was contrary to Ohio law and that when the plaintiff received workers' compensation benefits, he exhausted his remedies.⁴⁹ The fundamental stance of the dissent was that acceptance of the dual-capacity doctrine should be through legislative action, not judicial action.⁵⁰

In 1979 the Illinois Supreme Court clarified a long line of lower court cases⁵¹ when it adopted the dual-capacity doctrine in a products liability context. In *Smith v. Metropolitan Sanitary District*,⁵² two companies formed a joint venture for the purpose of undertaking a construction project. One of the joint venturers leased a truck with a defective emergency brake to the joint venture. Because of this defect, the truck rolled onto the employee's legs, resulting in their amputation.

Plaintiff charged the defendant with violations of the Illinois Structural Work Act,⁵³ negligence, and strict products liability. The court held that the Structural Work Act claim and the negligence action were barred by the exclusive-remedy provision of the Illinois Workmen's Compensation Act.⁵⁴

45. *Id.* at 280, 361 N.E.2d at 493-94.

46. *Id.* at 286, 361 N.E.2d at 496.

47. *Id.* at 285, 361 N.E.2d at 496.

48. *Id.* at 282-85, 361 N.E.2d at 495-96. Professor Larson has stated that it is a "well established principle that obliteration of a valuable and longstanding cause of action should not be found except when statutory language destroying the cause of action is clear; any doubt, then, should be resolved in favor of preserving rather than abolishing that right." 2A A. LARSON, *supra* note 3, § 72.80 at 14-122 to -123.

49. 49 Ohio App. 2d at 286, 361 N.E.2d at 497 (Wiley, J., concurring in part, dissenting in part).

50. *Id.* at 290, 361 N.E.2d at 499 (Wiley, J., concurring in part, dissenting in part). Professor Larson argues that *Mercer* and *Douglas* are unsound applications of the dual-capacity doctrine. See 2A A. LARSON, *supra* note 3, § 72.80, at 14-112 (Cum. Supp. 1980). For a rebuttal of this argument, see notes 91-92 *infra* and accompanying text.

51. See notes 122-28 *infra* and accompanying text.

52. 77 Ill. 2d 313, 396 N.E.2d 524 (1979).

53. ILL. ANN. STAT. ch. 48, § 60 (Smith-Hurd 1969).

54. 77 Ill. 2d at 319-20, 396 N.E.2d at 527. Prior to *Smith*, Illinois had not rejected the dual-capacity doctrine in a products liability setting. See *Winkler v. Hyster Co.*, 54 Ill.

The court, however, held that the strict products liability action was not barred because the defendant, when it leased the allegedly defective truck to the joint venture, occupied a dual capacity with respect to the employee: employer and product distributor.⁵⁵ As a result, the court held the defendant could be sued as the lessor of a defective vehicle.⁵⁶

App. 3d 282, 369 N.E.2d 606 (1977). *But see* Sago v. Amax Aluminum Mill Prods., Inc., 67 Ill. App. 3d 271, 385 N.E.2d 17 (1979) (dual-capacity doctrine recognized in Illinois but is strictly construed); Profflet v. Falconite, 56 Ill. App. 3d 168, 371 N.E.2d 1069 (1977) (employer's leasing unreasonably dangerous crane does not give rise to second capacity); Rosales v. Verson Allsteel Press Co., 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976) (removal of safety devices on punch press does not make employer a "quasi-manufacturer").

In *Winkler* the plaintiff was injured when cargo fell from a lift truck manufactured by the defendant employer. The plaintiff sued the employer alleging defective design and manufacture and failure to warn. The *Winkler* court dismissed plaintiff's complaint, holding that a product manufactured by an employer for use in the employer's business did not satisfy the "sale into the stream of commerce" requirement for a products liability suit. *Id.* at 287, 369 N.E.2d at 610. The dissent saw this holding merely as a means to avoid the application of the dual-capacity doctrine, which had been previously recognized in Illinois in another context. *Id.* at 288-90, 369 N.E.2d at 610-11 (Craven, P.J., dissenting); see *Marcus v. Green*, 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973); notes 122-28 *infra* and accompanying text.

Some doubt exists whether the *Winkler* majority fully understood the dual-capacity doctrine. The majority referred to the dual-capacity doctrine as the "dual purpose doctrine" four different times in its relatively short opinion. 54 Ill. App. 3d at 283-85, 369 N.E.2d at 607-08. Only once was the dual-capacity doctrine referred to as the "dual capacity doctrine." *Id.* at 284, 369 N.E.2d at 608. In workers' compensation law, the dual-purpose doctrine relates exclusively to the course of employment issue. 1 A. LARSON, *supra* note 3, at § 18 (1978). It is used to determine whether a trip made by an employer that has both a business and a personal purpose is to be accorded business trip status. See *id.* This confusion of concepts by the *Winkler* majority may indicate that the majority did not entirely understand, and as a result, did not fully address the dual-capacity issue. Presiding Justice Craven's dissent implies such a conclusion. See 54 Ill. App. 3d at 288-90, 369 N.E.2d at 610-12 (Craven, P.J., dissenting).

In accordance with the majority opinions in *Mercer v. Uniroyal, Inc.*, 49 Ohio App. 2d 279, 361 N.E.2d 492 (1977) (see notes 44-50 *supra* and accompanying text) and *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977) (see notes 34-43 *supra* and accompanying text), the *Winkler* dissent stated that the workers' compensation statute was designed as a substitute for previous rights of action against an employer. 54 Ill. App. 3d at 288, 369 N.E.2d at 611 (Craven, P.J., dissenting). The dissent reasoned that since the action for strict products liability was recognized after the enactment of the workers' compensation statute, the statute would not destroy the strict liability action. *Id.* Furthermore, according to the dissent, an employee cannot be expected to assume the risk of defective products when entering the employment relationship. *Id.* at 289, 369 N.E.2d at 611 (Craven, P.J., dissenting). Moreover, the dissent asserted that the policy goals of strict liability should not be subverted and that to deny the action would give an employer more protection than envisioned by the statute. *Id.* (Craven, P.J., dissenting).

55. 77 Ill. 2d at 320, 396 N.E.2d at 528. The lower court in *Smith v. Metropolitan Sanitary Dist.*, 61 Ill. App. 3d 103, 377 N.E.2d 1088 (1978), sidestepped the dual-capacity issue by holding that the lessor of the truck was not plaintiff's employer and therefore was subject to suit. *Id.* at 107, 377 N.E.2d at 1090.

56. 77 Ill. 2d at 321, 396 N.E.2d at 528. One of the most significant aspects of *Smith* is

One thing is clear from the decisions accepting the dual-capacity doctrine: the employer must be in the business of manufacturing or distributing the defective product. This rule, which was established in *Douglas*, also may explain several of the decisions that have rejected the dual-capacity doctrine.⁵⁷

2. Rejection of the Doctrine

Three jurisdictions, Arkansas, Indiana, and North Dakota, have expressly rejected the dual-capacity doctrine in a products liability context.⁵⁸ In the 1973 Arkansas case of *Lewis v. Gardner Engineering Corp.*,⁵⁹

that *Marcus v. Green*, 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973), is cited with approval. 77 Ill. 2d at 319, 396 N.E.2d at 528. Cases subsequent to *Marcus* had nearly limited *Marcus* out of existence. See notes 125-28 *infra* and accompanying text. *Smith* apparently has revived *Marcus* and the dual-capacity doctrine in Illinois. See *McCormick v. Caterpillar Tractor Co.*, 82 Ill. App. 3d 77, 402 N.E.2d 412 (1980) (application of dual-capacity doctrine; company physician).

The dual-capacity doctrine in Illinois was refined further by *Goetz v. Avildsen Tool & Machs., Inc.*, 82 Ill. App. 3d 1054, 403 N.E.2d 555 (1980). In *Goetz* the plaintiff-employee was injured by an automatic drill hopper that had been manufactured by one of the defendant's employees. The court rejected the application of the dual-capacity doctrine because the employer was not in the business of selling these machines to the public. *Id.* at 1059-62, 403 N.E.2d at 560-62.

57. *Latendresse v. Preskey*, 290 N.W.2d 267, 271 (N.D. 1980) (defective steel pin manufactured by employer not sold or made for the general public); see *Kottis v. United States Steel Corp.*, 543 F.2d 22 (7th Cir. 1976) (applying Indiana law) (employer only participant in manufacture of defective crane; no indication employer was in business of manufacturing cranes); *Lewis v. Gardner Eng'r Corp.*, 254 Ark. 137, 491 S.W.2d 778 (1973) (no indication employer was in business of manufacturing pile drivers); *Needham v. Fred's Frozen Foods, Inc.*, 359 N.E.2d 544 (Ind. App. 1977) (employer in frozen food business; not business of manufacturing pressure cookers); *Schlenk v. Aerial Contractors, Inc.*, 268 N.W.2d 466 (N.D. 1978) (no indication wire winder manufactured by employer was sold to general public).

58. Massachusetts recently joined those jurisdictions that have rejected the use of the dual-capacity doctrine in products liability cases. In *Longever v. Revere Copper & Brass, Inc.*, — Mass. —, 408 N.E.2d 857 (1980), an employee was injured by defective machinery manufactured by a separate division of the employer. The court held that the Massachusetts Workmen's Compensation Act barred the employee from suing the employer, and that the dual-capacity doctrine was not applicable because the defective product was a routine and integral part of the employment. *Id.* In addition, the court held that "separate divisions are insufficient to establish dual capacity." *Id.* at —, 408 N.E.2d at 859. This case is significant because the injury-causing product was also sold to the general public. *Id.* at —, 408 N.E.2d at 858. Therefore, the rejection of the dual-capacity doctrine in the products liability context is unequivocal. The *Longever* court, however, expressly left open the question whether the dual-capacity doctrine might be adopted in some other context. *Id.* at — n.7, 408 N.E.2d at 860 n.7.

Several dual-capacity cases involve defective products, but the decisions do not address the policies involved in the products liability context. See *Stone v. United States Steel Corp.*, 384 So. 2d 17 (Ala. 1980) (defective chemical vat; dual-capacity doctrine held to have application); *Taylor v. Pfadler Sybron Corp.*, 150 N.J. Super. 48, 374 A.2d 1222 (1977) (defective chemical vat; dual-capacity doctrine rejected); *Cooper v. Queen*, 586

the plaintiff was an employee of a corporation that had entered into a joint venture with the defendant on a construction project. A defect in a pile driver manufactured by the defendant caused some steel pilings to fall on and injure the plaintiff. The plaintiff brought an action against the defendant, arguing that the defendant should be estopped from invoking the exclusive-remedy provision to escape strict liability for the manufacture of a defective product. Without citing any authority, the Arkansas Supreme Court rejected the plaintiff's argument as being without merit.⁶⁰

The dissent argued for the application of the dual-capacity doctrine, commenting that "It was never intended that our workmen's compensation statutes should immunize one who happens to be an employer from any and all liability to one who happens to be his employee."⁶¹

In Indiana the dual-capacity doctrine was put to rest by cases in the Seventh Circuit and in the Indiana Court of Appeals. In the Seventh Circuit case, *Kottis v. United States Steel Corp.*,⁶² plaintiff's decedent was killed in the course of employment while performing duties as a craneman for the defendant. The plaintiff obtained workers' compensation benefits and brought suit against the employer under the dual-capacity theory, contending that the crane had been defectively manufactured.⁶³ The court, applying Indiana law, granted the defendant's motion for summary judgment. The court held that to allow a common-law products liability suit against the employer in situations in which the employment relationship predominates would make devastating inroads into the Indiana workers' compensation scheme and that it was up to the Indiana Legislature to make a decision involving such far-reaching implications.⁶⁴ One year later, in *Needham v. Fred's Frozen Foods, Inc.*,⁶⁵ the Indiana Court of Appeals adopted the reasoning of *Kottis* and held that the clear language of the workers' compensation statute precluded the adoption of the dual-capacity doctrine.⁶⁶

The last jurisdiction to reject the dual-capacity doctrine in a products liability context was North Dakota. In the 1978 case of *Schlenk v. Aerial*

S.W.2d 830 (Tenn. App. 1979) (fiberglass insulators removed from steel cables on tree trimming apparatus, employee electrocuted; dual-capacity doctrine held to have application).

59. 254 Ark. 17, 491 S.W.2d 778 (1973).

60. *Id.* at 18-20, 491 S.W.2d at 778-80.

61. *Id.* at 26, 491 S.W.2d at 783 (Fogleman, J., dissenting). The dissent quotes extensively from Professor Larson's treatise.

62. 543 F.2d 22 (7th Cir. 1976) (applying Indiana law).

63. *Id.* at 23.

64. *Id.* at 26.

65. 359 N.E.2d 544 (Ind. App. 1977) (employee sprayed with scalding grease from erupting pressure cooker that was designed, manufactured, and installed by employer).

66. *Id.* at 545.

Contractors, Inc.,⁶⁷ the plaintiff was injured in the course of his employment as a telephone lineman. The plaintiff brought a products liability suit against his employer, alleging negligent design and manufacture of the wire winder that caused his injury.⁶⁸ Without any analysis, the North Dakota Supreme Court held that the exclusive-remedy provision did not allow the application of the dual-capacity doctrine.⁶⁹

In *Latendresse v. Presky*,⁷⁰ the North Dakota Supreme Court once again rejected an employee's attempt to bring a products liability action against his employer. The plaintiff-employee was injured while installing a defective steel pin manufactured by the employer. The court rejected the dual-capacity doctrine, citing both the exclusive-remedy provision and Professor Larson, who takes the position that *Douglas* and *Mercer* are "unsound applications of the dual-capacity concept . . ."⁷¹ The court noted that even if it were to follow *Douglas* the employer still would be immune from suit because the product was not for sale to the public.⁷²

3. Dual Capacity—An Open Question

In six jurisdictions, Alabama, Louisiana, Minnesota, New Hampshire, New York, and South Carolina, the applicability of the dual-capacity doctrine in a products liability suit is still an open question. These courts found that the facts presented to them did not provide an opportunity to apply the doctrine.

In the Alabama Supreme Court case of *Mapson v. Montgomery White Trucks, Inc.*,⁷³ a repairman employed by the defendant, a truck dealership, was injured when a truck he was repairing rolled over. The repairman brought suit against the employer, alleging that a defect in the truck caused the injury and that the employer should be held liable as a seller of defective goods under the dual-capacity doctrine. The *Mapson* court dismissed the suit, stating that the facts did not allow consideration of the merits of the dual-capacity doctrine because the compensation statute expressly held employers immune from liability for employment-related accidents.⁷⁴ Because the dual-capacity doctrine applies only to employment-related accidents and because the *Mapson* court left the dual-capacity question open in a case that provided a prime opportunity to address the issue, the intent of the *Mapson* court is unclear at best.⁷⁵

67. 268 N.W.2d 466 (N.D. 1978).

68. *Id.* at 468.

69. *Id.* at 474.

70. 290 N.W.2d 267 (N.D. 1980).

71. *Id.* at 270-71; 2A A. LARSON, *supra* note 3, § 72.80, at 14-112 (Cum. Supp. 1980).

72. 290 N.W.2d at 271.

73. 357 So. 2d 971 (Ala. 1978).

74. *Id.* at 972.

75. *But see* *Stone v. United States Steel Corp.*, 384 So. 2d 17 (Ala. 1980) (dual-capac-

Two federal cases applying Louisiana law and South Carolina law declined to address the issue since the respective state courts had not ruled on the dual-capacity doctrine.⁷⁶

In Minnesota, the applicability of the dual-capacity doctrine to products liability cases was left undecided in *Netherland v. Acme Tag Co.*⁷⁷ Full discussion of this case appears later in this Note.⁷⁸

The New Hampshire Supreme Court in *DePaolo v. Spaulding Fibre Co.*,⁷⁹ held that an employee could not sue his employer for injuries the employee sustained while operating an allegedly defective heating fabrication machine designed and manufactured by the employer. Because the machine was designed and built for use solely in the employer's plant, the *DePaolo* court found that dismissal of plaintiff's cause of action was proper under *Douglas*.⁸⁰ Even though the court relied on the reasoning in *Douglas*, the dual-capacity doctrine was not mentioned.⁸¹ Therefore, acceptance of the doctrine in New Hampshire is still an open question.

The dual-capacity doctrine question remains undecided in New York as well. *Billy v. Consolidated Machine Tool Corp.*⁸² involved an employee who was struck by a ram that was part of a mill he was repairing in the course of his employment. The mill and the allegedly defective parts were manufactured by corporations that later were merged into the employer's corporation. The plaintiff argued that the policy aims of strict products liability should be promoted whether the manufacturer supplies the defective product to an employee or to a member of the general pub-

ity doctrine rejected); *Adair v. Moretti-Harrah Marble Co.*, 381 So. 2d 181 (Ala. 1980) (same).

76. See *Yale & Towne Mfg. Co. v. J. Ray McDermott Co.*, 347 F.2d 371 (5th Cir. 1965) (applying Louisiana law) (employee injured while using hoist manufactured by employer); *Strickland v. Textron, Inc.*, 433 F. Supp. 326 (D.S.C. 1977) (applying South Carolina law) (employee's hair caught in moving wheel of zipper machine manufactured by employer).

Recently, the South Carolina Supreme Court addressed the dual-capacity doctrine in *Parker v. Williams & Madjanik, Inc.*, — S.C. —, 267 S.E.2d 524 (1980). In *Parker* the employee was fatally injured when roof trusses collapsed. The court stated that "[a]ssuming without deciding that there are instances where the dual capacity doctrine could be applied, it is clear . . . the doctrine is inapplicable." *Id.* at —, 267 S.E.2d at 529. The court appears to reject the dual-capacity doctrine. Stating that to allow recovery would make employers' liability uncertain and indeterminate, the court declined "to make such a substantial inroad into [the] statutory compensation scheme." *Id.* Even though this language may constitute dicta, such a strong declaration of distaste for the dual-capacity doctrine surely will appear in subsequent cases.

77. No. 753534 (Minn. 4th Dist. Ct. Apr. 13, 1979).

78. See notes 93-96 *infra* and accompanying text.

79. — N.H. —, 397 A.2d 1048 (1979).

80. *Id.* at —, 397 A.2d at 1049.

81. *Id.*

82. 71 A.D.2d 796, 419 N.Y.S.2d 29 (1979) (mem.).

lic.⁸³ The *Billy* court, however, noting that New York has not adopted the dual-capacity doctrine, stated that "if a change is to be made, it should be done by the Court of Appeals."⁸⁴

4. Summary

Although courts disagree on whether the dual-capacity doctrine should be applied to products liability suits against employers, the adoption of dual capacity under the *Douglas* rule is the better reasoned approach. To allow an employer to use the exclusive-remedy provision of the workers' compensation statutes as a shield against products liability suits is not in accord with the intent and purpose of workers' compensation acts, nor does it promote the policies underlying strict products liability. Both workers' compensation acts and strict products liability principles attempt to place the cost of industrial accidents and product-related injuries on the party best able to bear and spread the cost.⁸⁵ To grant an employer immunity from employee-initiated products liability suits results in the employee obtaining only the generally incomplete economic recovery granted under workers' compensation acts.⁸⁶ As a result, the employee, not the employer, bears the cost of injuries caused by defective products; the employee is treated less favorably than the general public.

The rejection of the dual-capacity doctrine in the products liability context violates a basic principle of workers' compensation statutes, the concept of a quid pro quo.⁸⁷ Generally, an employee injured in the course of employment by a defective product has a right to a cause of action against the manufacturer in addition to workers' compensation benefits. If the employer also is the manufacturer and the dual-capacity doctrine is rejected, the employee's products liability action is erased by the broad construction of the exclusive-remedy provision. Workers' compensation statutes were enacted to insure an employee of recovery for work-related accidents, and in return the employee gave up the right to a cause of action against the employer for those accidents. There is no indication that workers' compensation acts were intended to eliminate

83. *Id.* at 796, 419 N.Y.S.2d at 30.

84. *Id.* The *Billy* court's observation is not totally accurate. In *Cline v. Avery Abrasives, Inc.*, 96 Misc. 2d 258, 409 N.Y.S.2d 91 (Sup. Ct. 1978) (action against employer's workmen's compensation insurer for negligent inspection), the court stated in dicta, based on a line of New York cases, that under the dual-capacity doctrine an employee can sue the employer-hospital for the aggravation of injuries sustained in the course of employment when the treatment given to the employee is available generally to members of the public. *Id.* at 267, 409 N.Y.S.2d at 97.

85. See notes 30-33 *supra* and accompanying text.

86. See note 12 *supra*.

87. 2A A. LARSON, *supra* note 3, § 65.10, at 12-3 to -4.

products liability suits.⁸⁸ If the dual-capacity doctrine is rejected, the employee is forced to give up the right to sue for injuries caused by defective products and gets nothing in return. The employer has a great deal to gain if the dual-capacity doctrine is rejected; overall liability is decreased if those products also are used in the employer's business or businesses. Given the growing domination of business conglomerates that are in many respects self-sufficient because they are able to satisfy many of their own product needs, workers' compensation acts may effectively eradicate a substantial number of products liability suits.⁸⁹ Furthermore, rejection of the dual-capacity doctrine would not serve to deter employers from manufacturing and using unsafe products because the employer would be protected by benefit limits.⁹⁰

In contrast to the views expressed above, Professor Larson asserts that *Douglas* is an unsound application of the dual-capacity doctrine because the use of the product was a routine and integral part of the employment.⁹¹ Whether a product is a routine and integral part of the employment, however, is irrelevant under the dual-capacity doctrine as formulated by Professor Larson. The only issue is whether the second capacity generates obligations unrelated to those flowing from the employment relationship.⁹²

The *Douglas* rule is a logical limitation of the dual-capacity doctrine. The *Douglas* rule ensures that only employers who are in the business of manufacturing the injury-causing product for sale to the public will be

88. See, e.g., *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 110-11, 137 Cal. Rptr. 797, 801 (1977); *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 797-98, 354 N.E.2d 553, 561 (1976) (Simon, J., dissenting); *Mercer v. Uniroyal, Inc.*, 49 Ohio App. 2d 279, 283-84, 361 N.E.2d 492, 495 (1977); 2A A. LARSON, *supra* note 3, § 72.80, at 14-122 to -123.

89. See notes 143-50 *infra* and accompanying text.

90. *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 113, 137 Cal. Rptr. 797, 803 (1977). Justice Simon, dissenting in *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976), in which an employer who removed safety devices on a punch press that injured an employee was held not to be a quasi-manufacturer, argued compellingly for application of the dual-capacity doctrine in products liability cases. Justice Simon stated that denying employees recovery against employers who manufacture defective products deprives a class of plaintiffs of the safeguards that the law requires of manufacturers. *Id.* at 798, 354 N.E.2d at 561-62 (Simon, J., dissenting). Furthermore, Justice Simon argued that a manufacturer-employer who removes safety devices should not be shielded by a humane law (the workers' compensation act), especially when such modifications were made to increase profits, and he observed that the workers' compensation scheme has survived even though Illinois law, by authorizing third-party suits against employers, allows employees to recover indirectly from their employers. *Id.* (Simon, J., dissenting).

The counterargument to this rationale is that employers will be sufficiently deterred by the prospect of nonemployee products liability claims.

91. 2A A. LARSON, *supra* note 3, § 72.80, at 14-112 (Cum. Supp. 1980).

92. *Id.* at 14-117 (1976 & Cum. Supp. 1980).

held liable under the dual-capacity doctrine. Therefore, employers do not acquire new obligations and liabilities outside of their usual course of business. The interests of both employers and employees are served by the dual-capacity doctrine under the *Douglas* rule. Injured employees achieve protection under the products liability laws equal to that afforded the general public. Employers' liability for injuries caused by defective products is limited to those products for which a manufacturer would expect to have products liability exposure.

5. The Minnesota Approach

Although the Minnesota Supreme Court has not addressed the dual-capacity doctrine in the context of a products liability action against an employer, Hennepin County District Court Judge Donald Barbeau did so in the 1979 case of *Netherland v. Acme Tag Co.*⁹³ The plaintiff was injured, apparently by a machine manufactured by the defendant-employer. The plaintiff obtained workers' compensation benefits and then sued the defendant under the dual-capacity doctrine for strict liability in tort, breach of warranty, and negligence.

Judge Barbeau, noting that Minnesota had no case law on the subject, presented a detailed outline of several significant dual-capacity cases from other jurisdictions, emphasizing *Douglas v. E. & J. Gallo Winery*.⁹⁴ Judge Barbeau, citing the *Douglas* rule, held that the present action was barred by the exclusive-remedy provision of the Minnesota workers' compensation statute because a sale to one outside company did not constitute manufacturing for sale to the general public.⁹⁵ Therefore, under *Douglas*, the most liberal dual-capacity decision, the doctrine did not apply.

Although Judge Barbeau applied dual-capacity case law to reach the decision in the case, language at the end of the opinion raises doubts as to his acceptance of the dual-capacity doctrine. Judge Barbeau stated:

Having found no Minnesota cases dealing with a situation such as the present, this Court finds the need to rely upon the case law cited above in deciding the motions now before it. Upon an examination of the case law the Court must now order that plaintiff's Complaint be dismissed with prejudice. Allowing the Complaint to stand would expand the application of the dual capacity doctrine to a point beyond which even the most liberal decision known to this Court has allowed. The Court is sympathetic to the plaintiff's injuries and distress, but it is within the province of the legislature, and not of this Court, to modify the Minnesota Workers' Compensation Law so as to allow the imposition of manufacturer's liability on employers. Plaintiff's cause of action

93. No. 753534 (Minn. 4th Dist. Ct. Apr. 13, 1979).

94. 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977). For a full discussion of *Douglas*, see notes 32-43 *supra* and accompanying text.

95. No. 753534, slip op. at 6.

is barred by Minn. Stat. 176.031.⁹⁶

Because the *Netherland* case fell outside basic dual-capacity theory, Judge Barbeau did not have a proper factual opportunity to examine the policy arguments underlying the application of the dual-capacity doctrine in a products liability setting. Therefore, whether the dual-capacity doctrine will be applied in Minnesota is an open question. The Minnesota Supreme Court has not ruled on the dual-capacity issue. Nevertheless, recognition of the dual-capacity doctrine in products liability cases appears consistent with Minnesota case law.

In *Boek v. Wong Hing*,⁹⁷ the defendant-employer intentionally and maliciously struck at the plaintiff-employee with a heavy broom handle, dislocating two finger joints on the hand that plaintiff held up to protect his head. Intentional torts committed by an employer are covered by the workers' compensation statute and are subject to the exclusive-remedy provision.⁹⁸ The Minnesota Supreme Court held, however, that a plaintiff in such a case can elect either to sue at law or to obtain benefits under the compensation statute.⁹⁹ The *Boek* court held that public policy would not allow an employer to invoke the exclusive-remedy provision and compensation ceiling of the workers' compensation statute to avoid liability for intentional torts.¹⁰⁰ It is clear from the *Boek* holding that the Minnesota Supreme Court is willing to recognize exceptions to the exclusive-remedy provision in the interest of public policy.

Consequently, an exception to the exclusive-remedy provision should be recognized when an employee is injured by a defective product manufactured by his employer. Public policy demands that manufacturers of defective products bear the full cost of such defects and that the manufacture of defective products be discouraged.¹⁰¹ In the spirit of *Boek* and for the reasons stated in the previous section, Minnesota should adopt the dual-capacity doctrine and the *Douglas* rule in products liability cases.

B. Provider of Medical Services

The 1952 California decision of *Duprey v. Shane*¹⁰² was the first case to use dual-capacity principles when an employer also provides medical services.¹⁰³ Since *Duprey* a split of authority has occurred whether an

96. *Id.*

97. 180 Minn. 470, 231 N.W. 233 (1930).

98. *See id.* at 471, 231 N.W. at 233-34.

99. *Id.* at 471-72, 231 N.W. at 234; *see* Johns-Manville Prods. Corp. v. Contra Costa Superior Court, — Cal. 3d —, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (employee entitled to bring action against employer for aggravation of work-related injuries caused by employer's fraudulent concealment of asbestos-caused disease).

100. 180 Minn. at 471-72, 231 N.W. at 234.

101. *See* notes 30-33 *supra* and accompanying text.

102. 39 Cal. 2d 781, 249 P.2d 8 (1952).

103. *See* notes 14-21 *supra* and accompanying text.

employee can bring a common-law action against the employer for the aggravation of work-related injuries when the employer provides medical services.

Four jurisdictions, California,¹⁰⁴ Ohio,¹⁰⁵ Illinois,¹⁰⁶ and New York,¹⁰⁷ have allowed common-law actions under the dual-capacity doctrine against an employer who provides medical services. Three jurisdictions, Tennessee,¹⁰⁸ Mississippi,¹⁰⁹ and Florida,¹¹⁰ have rejected the dual-ca-

104. In *D'Angona v. County of Los Angeles*, — Cal. 3d —, 613 P.2d 238, 166 Cal. Rptr. 177 (1980), the court held that a county hospital employee could sue the county because the hospital employees who treated the plaintiff were responsible for aggravating a disease that plaintiff had contracted in the course of employment. The court held that *Duprey* applied even though the county itself did not treat the plaintiff. *Id.* at —, 613 P.2d at 242, 166 Cal. Rptr. at 180-81.

105. *Guy v. Arthur H. Thomas Co.*, 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978) (employee who contracted mercury poisoning sued employer-hospital for failure to diagnose condition).

106. *McCormick v. Caterpillar Tractor Co.*, 82 Ill. App. 3d 77, 402 N.E.2d 412 (1980) (suit against employer for malpractice of physician hired by employer allowed).

107. In *Cline v. Avery Abrasives, Inc.*, 96 Misc. 2d 258, 409 N.Y.S.2d 91 (Sup. Ct. 1978) (action against employer's workers' compensation carrier for negligent inspection), the court stated that under the dual-capacity doctrine an employee can sue the employer-hospital for the aggravation of injuries sustained in the course of employment only when such services are available generally to members of the public.

A series of New York cases that did not expressly address the dual-capacity doctrine is the origin of the statement in *Cline*. In *Volk v. City of New York*, 284 N.Y. 279, 30 N.E.2d 596 (1940), a nurse at a city hospital became ill after eating food while on duty. The employee was treated at a nurses' infirmary and was given an adulterated injection that resulted in the loss of the use of the nurse's entire arm. The *Volk* court held that the common-law action against the city was not barred because it was an injury that did not arise out of and in the course of employment. *Id.* at 283, 30 N.E.2d at 597. The court stated: "It was a risk to which anyone receiving like treatment at the hospital would have been subjected. The occurrence of the injury was not made more likely by the fact of her employment." *Id.* The dissent stated that since the medical treatment was a part of the employment contract, such an injury clearly arose out of and in the course of employment. *Id.* at 287, 30 N.E.2d at 599 (Lehman, C.J., dissenting). For two cases supporting *Volk*, see *Stevens v. County of Nassau*, 56 A.D.2d 866, 392 N.Y.S.2d 332 (1977) (mem.) (food service employee who fell on hospital grounds sued hospital-employer for negligent treatment of broken wrist); *Sivertsen v. State*, 19 N.Y.2d 698, 225 N.E.2d 572, 278 N.Y.S.2d 886 (1967) (employee at mental institution injured when stretcher broke while employee was being transported to infirmary); cf. *Garcia v. Iserson*, 33 N.Y.2d 421, 309 N.E.2d 420, 353 N.Y.S.2d 955 (1974) (action against employer for malpractice of physician at nonpublic infirmary on employer premises).

108. See *McAlister v. Methodist Hosp.*, 550 S.W.2d 240 (Tenn. 1977) (hospital employee sued employer for negligent treatment of back injury), discussed in 8 MEMPHIS ST. U.L. REV. 163 (1977). In *McAlister* the Tennessee Supreme Court ruled that even though the facts before the court were almost identical to those in *Duprey*, the action against the employer was barred by the exclusive-remedy provision. *Id.* at 243-45. The court stated: "The employer is the employer, not some person other than the employer. It is that simple." *Id.* at 246.

109. See *Trotter v. Litton Systems, Inc.*, 370 So. 2d 244 (Miss. 1979) (infection caused by negligence of personnel at employer's first aid station). The court relied upon *McAlis-*

capacity doctrine in the context of employer-supplied medical services.¹¹¹

In *D'Angona v. County of Los Angeles*,¹¹² a county hospital employee's work-related injury was aggravated by medical treatment at the hospital. The defendant argued that since the county itself did not treat plaintiff, *Duprey* was inapplicable. The court held that such a distinction is not valid, because "in treating plaintiff's injuries the hospital did not act in the capacity as employer but as a hospital, and since it assumed the obligations of a hospital to a patient it should be liable in that capacity rather than as an employer for the aggravation of plaintiff's injury."¹¹³ Citing *Deauville v. Hall*,¹¹⁴ the court distinguished the situation in which an employer that is not in the business of supplying medical services hires a physician or provides an in-house first aid clinic.¹¹⁵ The following rule may be gleaned from *D'Angona*: the dual-capacity doctrine applies when the employer physically performs the medical service or is in the business of providing medical services to the public in general.

Professor Larson takes a more conservative position. He argues that the dual-capacity doctrine should apply only if the employer personally performs medical service, as in *Duprey*.¹¹⁶ Professor Larson argues fur-

ter v. Methodist Hosp., 550 S.W.2d 240 (Tenn. 1977) and Warwick v. Hudson Pulp & Paper Co., 303 So. 2d 701 (Fla. Dist. Ct. App. 1974).

110. See Warwick v. Hudson Pulp & Paper Co., 303 So. 2d 701 (Fla. Dist. Ct. App. 1974) (aggravation of back injury at in-house clinic).

111. There are several cases that do not expressly deal with dual-capacity concepts, but have particular relevance with respect to an employer providing medical services. See *Lindsay v. George Washington Univ.*, 279 F.2d 819 (D.C. Cir. 1960) (maintenance man employed by defendant negligently treated for work-related injury at hospital also owned by defendant, action held barred); *Hayes v. Marshall Field & Co.*, 351 Ill. App. 329, 115 N.E.2d 99 (1953) (company physician pierced plaintiff's eye, action against employer held barred); *Vogel v. Jones & Laughlin Steel Corp.*, 221 Pa. Super. 157, 289 A.2d 158 (1972) (work injury aggravated by medical clinic provided by employer, action against employer held barred). The holdings in these cases are consistent with the general rule that a dual capacity will not be found unless the employer is in the business of providing medical services. See notes 112-20 *infra* and accompanying text.

112. — Cal. 3d —, 613 P.2d 238, 166 Cal. Rptr. 177 (1980).

113. *Id.* at —, 613 P.2d at 242, 166 Cal. Rptr. at 181.

114. 188 Cal. App. 2d 535, 10 Cal. Rptr. 511 (1961) (action against employer for negligence of employer's first-aid man in treating work-related injury held barred by workers' compensation act).

115. — Cal. 3d at —, 613 P.2d at 243, 166 Cal. Rptr. at 182.

116. *Id.* at —, 613 P.2d at 242, 166 Cal. Rptr. at 181. Professor Larson states:

When we come to the doctor-employer relation . . . [t]he employer as employer is under a duty specifically imposed by the compensation act to provide medical treatment. Normally he would do this by supplying a physician. If he did so, and if the physician aggravated the injury by negligence, it is elementary that the employer could not be sued by the employee in tort. Why, the defendant will ask, should the result be any different merely because the employer happens to be in a position to provide the services personally? The answer . . . lies in the difference between providing services in the sense of paying for them, and providing services by physically performing them. The doctor-patient relation, with all the legal obligations that it entails, does not spring up as the result of an

ther that there is a crucial difference between paying for services and physically performing them; it is impossible to cause physical injury by writing a check.¹¹⁷

Minnesota has yet to consider the dual-capacity doctrine in medical service cases. There are important and appealing policy reasons for adopting the *D'Angona* rule. First, the *D'Angona* rule parallels the rule in products liability cases.¹¹⁸ The employer will be held liable under the dual-capacity doctrine only if the employer is in the business of manufacturing goods for or supplying services to the general public.¹¹⁹ Therefore, employers do not acquire new obligations and liabilities outside of their usual course of business. Second, both *Douglas* and *D'Angona* ensure that employees who receive goods or services from the employer will not be treated in a manner different from members of the public who receive the same goods and services. Finally, both the obligation to provide adequate medical services and manufacture safe products are wholly unrelated to the employment relationship.¹²⁰ For these reasons, Minnesota should adopt the dual-capacity doctrine under the *D'Angona* rule.

C. Owner of Real Estate

Only four jurisdictions, Illinois, Louisiana, New York, and Iowa, have addressed the issue of whether an employer who also occupies the position of an owner of property may be liable to an employee.¹²¹ The only decision to have adopted the dual-capacity doctrine was the 1973 Illinois

essentially financial act—paying the doctor's bill. But it does spring up as the result of undertaking to perform the medical treatment directly.

2A A. LARSON, *supra* note 3, § 72.80, at 14-117 to -118 (footnote omitted).

117. Larson, *Workmen's Compensation Insurer As Suable Third Party*, 1969 DUKE L.J. 1117, 1137.

118. The *D'Angona* rule explains the bulk of the cases in the medical service context. See, e.g., *Warwick v. Hudson Pulp & Paper Co.*, 303 So. 2d 701 (Fla. Dist. Ct. App. 1974) (employee treated in employer's in-house clinic; dual-capacity doctrine rejected); *Trotter v. Litton Systems, Inc.*, 370 So. 2d 244 (Miss. 1979) (employee treated in employer's first-aid station; dual-capacity doctrine rejected); *Volk v. City of New York*, 284 N.Y. 279, 30 N.E.2d 596 (1940) (nurse treated at employer's hospital; suit against employer allowed); *Guy v. Arthur H. Thomas Co.*, 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978) (hospital employee sues employer for failure to diagnose condition; dual-capacity doctrine adopted).

Two cases, however, deviate from the *D'Angona* rule. See *McCormick v. Caterpillar Tractor Co.*, 82 Ill. App. 3d 77, 402 N.E.2d 412 (1980) (employee sued employer for malpractice of medical practitioner hired by employer; employer held not immune); *McAlister v. Methodist Hosp.*, 550 S.W.2d 240 (Tenn. 1977) (hospital treatment negligently performed by other hospital employees; employer held immune).

119. See notes 34-43, 112-15 *supra* and accompanying text.

120. See *id.* But see MINN. STAT. § 176.135(1) (1978) (employer shall furnish medical treatment).

121. Two other jurisdictions have touched upon an employer's common-law liability for injuries to employees on land owned by the employer. See *Kottis v. United States Steel Corp.*, 543 F.2d 22 (7th Cir. 1976) (applying Indiana law) (craneman killed on employer's property, dual-capacity doctrine rejected); *State v. Luckie*, 145 So. 2d 239 (Fla. Dist. Ct.

case of *Marcus v. Green*.¹²² In *Marcus* the plaintiff, a carpenter, was injured when some scaffolding collapsed during the construction of an apartment building. The plaintiff was employed by a business solely owned by the defendant, who was also a partner in the ownership of the property where the accident occurred. The plaintiff received workers' compensation benefits from the defendant employer and sued the partnership under the Illinois Structural Work Act.¹²³ The *Marcus* court rejected the defendant's argument that workers' compensation was the plaintiff's sole remedy, holding that the duty imposed under the Structural Work Act is distinct from the duty of an employer, thus allowing the application of the dual-capacity doctrine.¹²⁴

The rule established in *Marcus* was short lived. Three years later, the same court, in *Dintelman v. Granite City Steel Co.*,¹²⁵ held that *Marcus* was not a sweeping repeal of employer immunity, but a decision that allowed a common-law suit against a separate legal entity that was not the statutory employer, that is, the partnership.¹²⁶ A series of Illinois decisions

App. 1962) (general contractor who owned land on which independent contractor employee was injured not statutory employer).

122. 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973).

123. The Illinois Structural Work Act provides:

All scaffolds, hoists, cranes, stays, ladders, supports, or other mechanical contrivances, erected or constructed by any person, firm or corporation in this State for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct, or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon.

Scaffold, or staging, swung or suspended from an overhead support more than twenty (20) feet from the ground or floor shall have, where practicable, a safety rail properly bolted, secured and braced, rising a [at] least thirty-four (34) inches above the floor or main portion of such scaffolding or staging, and extending along the entire length of the outside and ends thereof, and property attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure.

ILL. ANN. STAT. ch. 48, § 60 (Smith-Hurd 1969).

124. 13 Ill. App. 3d at 706-07, 300 N.E.2d at 517-18.

125. 35 Ill. App. 3d 509, 341 N.E.2d 425 (1976).

126. *Id.* at 512, 341 N.E.2d at 427. In Minnesota, a partnership and its individual partners are separate entities for the purpose of determining the statutory employer. See *Monson v. Arcand*, 239 Minn. 336, 58 N.W.2d 753 (1953). In *Monson* the Minnesota Supreme Court allowed a common-law action against the defendant partner for injuries arising out of an automobile accident because the partnership and not the defendant partner was the employer according to the workers' compensation insurance policy. See *id.* at 340-41, 58 N.W.2d at 756-57.

The result in *Monson* may have been modified recently by legislative enactment of an amendment to section 176.061, subdivision 5 of Minnesota Statutes: "A co-employee working for the same employer is not liable for a personal injury incurred by another employee unless the injury resulted from the gross negligence of the co-employee or was

under the Structural Work Act subsequently denied the application of *Marcus* and the dual-capacity doctrine.¹²⁷ Although these cases did not overrule *Marcus*, the *Marcus* decision was for all practical purposes limited out of existence.¹²⁸

Louisiana has made it clear in several employer-owner cases that it is up to the legislature to adopt the dual-capacity doctrine, and until that time, the courts will find the doctrine inapplicable.¹²⁹

No other courts have expressly addressed the dual-capacity doctrine in the owner context. Iowa, however, without using the dual-capacity language, rejected an attempt by an injured worker to sue his employer for injuries sustained on property owned by the employer when the property was in no way connected with the employer's business.¹³⁰ Similarly, New York has consistently rejected attempts by employees to bring a common-law action against their employer solely on the basis of the employer's ownership of property that contains the injury-causing instrumentality.¹³¹

When an employer's second capacity is that of an owner of property,

intentionally inflicted by the co-employee." Act of June 7, 1979, ch. 3, § 31, 1979 Minn. Laws Ex. Sess. 1256, 1272.

Under *Monson* if a partnership is the employer, then the individual partners can be subject to a common-law suit. Under the circumstances in which a partner is not the employer then the partner could be considered to be a coemployee of the other employees. Therefore, under the amendment's language, an employee injured by a partner who is not the statutory employer could not bring suit against the tortfeasor-partner unless the act was intentional or caused by gross negligence.

127. *Carey v. Coca-Cola Bottling Co.*, 48 Ill. App. 3d 482, 363 N.E.2d 400 (1977); *Kim v. Raymond*, 44 Ill. App. 3d 37, 358 N.E.2d 34 (1976); *Walker v. Berkshire Foods, Inc.*, 41 Ill. App. 3d 595, 354 N.E.2d 626 (1976); *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976).

128. In 1979, however, the Illinois Supreme Court in *Smith v. Metropolitan Sanitary Dist.*, 77 Ill. 2d 313, 396 N.E.2d 524 (1979), apparently revived *Marcus* and the dual-capacity doctrine.

129. See *Herbert v. Gulf States Utilities Co.*, 369 So. 2d 1104 (La. App. 1979) (construction employee electrocuted when statutory employer failed to de-energize powerline on property owned by employer; dual-capacity doctrine inapplicable); *Finch v. Jordano*, 284 So. 2d 641 (La. App. 1973) (employee killed in sewer ditch cave-in on property owned by employer).

130. *Jansen v. Harmon*, 164 N.W.2d 323 (Iowa 1969).

131. *E.g.*, *Naso v. Lafata*, 4 N.Y.2d 585, 152 N.E.2d 59, 176 N.Y.S.2d 622 (1958) (injury in car owned by employer); *Williams v. Hartshorn*, 296 N.Y. 49, 69 N.E.2d 557 (1946) (suit against member of partnership who owned building where injury occurred); *Di Bernardo v. Heimroth*, 58 A.D.2d 344, 396 N.Y.S.2d 904 (1977) (injury connected with truck rented by employer); *Minsky v. Baitelman*, 281 A.D. 910, 120 N.Y.S.2d 86 (1953) (mem.) (suit against partner who owned building where partnership did business); *Winter v. Peter Doelger Brewing Co.*, 175 A.D. 796, 162 N.Y.S. 469 (1916) (injury at building coincidentally owned and controlled by employer), *aff'd mem.*, 226 N.Y. 581, 123 N.E. 895 (1919); *Costanzo v. Mackler*, 34 Misc. 2d 188, 227 N.Y.S.2d 750 (Sup. Ct.) (injury connected with truck rented by employer), *aff'd mem.*, 17 A.D.2d 948, 233 N.Y.S.2d 1016 (1962).

the application of the dual-capacity doctrine becomes difficult to justify. An employer has a duty to supply the employee with a safe working environment.¹³² This duty to provide relatively safe premises is identical to the duty imposed upon landowners with regard to property entrants.¹³³ Because it cannot be said that the status as a landowner gives rise to a duty independent of that imposed by the employer-employee relationship, the dual-capacity doctrine should have no application. However, when a statute imposes a duty upon the owner of property distinct from any common-law duty, the dual-capacity doctrine may apply.¹³⁴

Almost no support exists for the adoption of the dual-capacity doctrine when the employer's second capacity is that of an owner of property. For the above-stated reasons, Minnesota should reject application of the dual-capacity doctrine to employer-landowners.

D. Insurer

Only three courts have discussed the liability of an employer under the dual-capacity doctrine when an employer's second capacity is that of an insurer.¹³⁵ In the Arizona Court of Appeals case of *Denman v. Duval Sierita Corp.*,¹³⁶ the plaintiff brought a common-law action based on negligent inspection against the defendant-employer, in its capacity as a self-

132. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 526 (4th ed. 1971).

133. See, e.g., *Rowland v. Christian*, 69 Cal. 2d 108, 118-19, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968); *Peterson v. Balach*, 294 Minn. 161, 174, 199 N.W.2d 639, 647 (1972). Professor Larson has stated:

Similarly, it can at least be argued that the liability of the owner of the land is different from that of an employer working on the premises. The legal doctrines governing the responsibilities of landowners to different classes of persons entering upon the land are ancient and distinctive, and again are different in quality and range from the rules governing the liability of a contractor to his employees.

2A A. LARSON, *supra* note 3, § 72.80, at 14-117.

134. See notes 173-78 *infra* and accompanying text.

135. In *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972), the California Supreme Court was faced with the issue of whether the defendant insurance company, which had used deceptive means to obtain information concerning the extent of plaintiff's disability, was a statutory alter ego of the employer and thus immune from common-law liability or whether it had stepped outside its role as an insurer, thus exposing itself to common-law liability. The court drew an analogy to *Duprey* and held that the action was not barred since the insurer stepped out of its role as an insurer as well as out of its statutory protection. *Id.* at 634-36, 498 P.2d at 1076-77, 102 Cal. Rptr. at 828-29. This case has limited value in support of the dual-capacity doctrine because the defendant was not the plaintiff's employer. *Unruh*, however, does support the proposition that a party who is immune from suit pursuant to the exclusive-remedy provision of a workers' compensation statute can lose that immunity if that party steps outside the statutorily protected status. Therefore, even though it is not direct support for the dual-capacity doctrine, *Unruh* is at least analogous support.

136. 27 Ariz. App. 684, 558 P.2d 712 (1976).

insurer, for injuries the plaintiff sustained in the course of employment. The *Denman* court flatly rejected both the characterization of the employer-insurance carrier as a third party and the dual-capacity doctrine itself, stating that the dual-capacity doctrine is without support in case law or logic.¹³⁷

Similarly, in *Adair v. Moretti-Harrah Marble Co.*,¹³⁸ the Alabama Supreme Court held that the plaintiff could not sue his employer in its capacity as a self-insurer for failing to perform adequate safety inspections. In rejecting the dual-capacity doctrine the court held that an employer cannot be a party "other than the employer."¹³⁹ In *Swain v. J.L. Hudson Co.*,¹⁴⁰ the Michigan Court of Appeals held that a self-insured employer will not be considered to be a third party against whom an employee can institute suit for failure to inspect and warn.¹⁴¹

The cases that have rejected the dual-capacity doctrine when the employer's second capacity is that of a self-insurer have implicitly recognized that self-insurance is within the scope of employer activity. Furthermore, the employee's cause of action is usually based on negligent inspection of the premises. Because the employer has a duty to provide safe working premises,¹⁴² taking on the role of an insurer does not give rise to a duty independent of that imposed by the employer-employee relationship. Thus, the dual-capacity doctrine should not apply. The only situation in which the dual-capacity doctrine may apply is if the employer is also in the business of providing insurance for the general public. This result is consistent with the *Douglas* and *D'Angona* rules. Unfortunately, no cases involving this fact situation have been decided. Because it is difficult to separate the duties owed by an employer from those owed by a self-insured employer, Minnesota should not apply the dual-capacity doctrine to self-insurers.

E. Corporate Subdivisions or Related Corporations

Courts have uniformly held that the operation of different divisions within a corporation does not create separate capacities within the meaning of the dual-capacity doctrine.¹⁴³ Even California, which has adopted

137. *Id.* at 685, 558 P.2d at 713.

138. 381 So. 2d 181 (Ala. 1980).

139. *Id.* at 183.

140. 60 Mich. App. 361, 230 N.W.2d 433 (1975).

141. *Id.* at 363, 230 N.W.2d at 434.

142. W. PROSSER, *supra* note 132.

143. See, e.g., *Miller v. United States*, 307 F. Supp. 932 (E.D. Va. 1969) (plaintiff employed in painting division of shipyard sued design division for injuries); *Stone v. United States Steel Corp.*, 384 So. 2d 17 (Ala. 1980) (employee of corporate division of defendant fell into chemical vat, defendant sued as owner of premises, held immune); *Douglas v. E. & J. Gallo Winery*, 60 Cal. App. 3d 103, 109, 137 Cal. Rptr. 797, 800 (1977) (dicta); *Longever v. Revere Copper & Brass, Inc.*, — Mass. —, —, 408 N.E.2d 857, 859 (1980)

the dual-capacity doctrine in other situations, does not apply the doctrine to mere separations or divisions within the same corporation.¹⁴⁴ The only cases that have allowed an employee's common-law suit against a corporate subdivision or related corporation are those in which the subdivision or corporation is held to be an entity separate from the employer; thus the case is taken outside the exclusive-remedy provision and the principles of the dual-capacity doctrine.¹⁴⁵

A good argument nevertheless may be made in favor of imposing common-law liability on an employer when a separate division of the employer's business causes an employee's injury. In *Mercer v. Uniroyal, Inc.*,¹⁴⁶ the court stated:

In recent years, corporations and employers have entered a variety of fields and economic factors have promoted diversification rather than specialization. Conglomerates have become the rule. A corporation's economic structure should not dictate the right of the injured to recover or that each new corporate merger erases a like number of causes of action.¹⁴⁷

(employee injured by defective machinery manufactured by a separate division of the employer, held immune); *Hudson v. Allen*, 11 Mich. App. 511, 513-14, 161 N.W.2d 596, 598-99 (1968) (drugstore employee injured at laundromat also owned by employer); *Taylor v. Pfaudler Sybron Corp.*, 150 N.J. Super. 48, 374 A.2d 1222 (1977) (employee of corporate division sued another corporate division for the manufacture of a defective chemical vat, held immune). *But see* Davis, *Workmen's Compensation—Using an Enterprise Theory of Employment to Determine Who Is a Third Party Tort-Feasor*, 32 U. PITT. L. REV. 289 (1971) (third-party actions should be allowed when plaintiff employed by one enterprise is injured by another separate enterprise even if a division of one corporate entity).

Professor Larson comments: "One thing is clear. Dual capacity will not be found merely because the employer has a number of departments or divisions that perhaps are quite separate in their functions and operations." 2A A. LARSON, *supra* note 3, § 72.80, at 14-115 (footnote omitted).

144. *See* *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 109, 137 Cal. Rptr. 797, 800 (1977).

145. *See, e.g.*, *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979) (applying Kentucky law); *Thomas v. Hycon, Inc.*, 244 F. Supp. 151 (D.D.C. 1965) (under Maryland law corporation not immune when plaintiff injured in truck with defective brakes owned by wholly owned subdivision); *Daisernia v. Co-Operative G.L.F. Holding Corp.*, 26 A.D.2d 594, 270 N.Y.S.2d 542 (1966) (per curiam) (wholly owned subsidiary held not immune from suit by parent employee). For a different viewpoint leading to immunity, see *Potts v. Knox-Tenn Rental, Inc.*, 467 S.W.2d 796 (Tenn. App. 1970) (plaintiff held to be engaged in dual employment).

146. 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976).

147. *Id.* at 285-86, 361 N.E.2d at 496 (footnotes omitted). The *Mercer* court's opinion set forth some interesting statistics:

From 1955 to 1959, there was an annual average of 1,162 mergers. From 1960 to 1969, there were 1,664 mergers annually and by 1967 through 1969 there was an average of 3,605 mergers per year. Between 1962 and 1968, 110 of Fortune's 500 industrials were absorbed by mergers. See M. Green, B. Moore & B. Wasserstein, *The Closed Enterprise System* (1972), at pp. 10-11.

Id. at 286 n.2, 361 N.E.2d at 496 n.2.

In accord with *Mercer*, one author observed:

In today's complex business world we often find industry or government involved in a multiplicity of business functions. It is not at all uncommon for a parent or conglomerate corporation to exist as a shell for numerous businesses manufacturing hundreds of different products or performing a like number of services.¹⁴⁸

Fairness and an acceptance of the realities of the business world require the recognition of the dual-capacity doctrine in Minnesota and elsewhere. If a corporate subdivision is in fact separate and independent, even though by law it is part of one corporate organism, to limit an injured employee to the generally inadequate workers' compensation remedy merely on the basis of corporate structure would be inequitable.¹⁴⁹ An employer's common-law liability should not be determined by the employer's ability to acquire the corporations that may cause injury to the employee.¹⁵⁰ Even though an employee may have given up a common-law right of recovery against the immediate employer, that employee should not necessarily be required to relinquish that right as against possibly unknown, nonimmediate employers, when the employee may not have assumed or contemplated the risks of the employer's work.

F. Government Subdivisions

As with corporate subdivisions or related corporations, courts have consistently held that an employee of one governmental division cannot sue that employer when another governmental division causes the employee to suffer injuries compensable under workers' compensation acts.¹⁵¹ Although the application of the dual-capacity doctrine to different governmental subdivisions is not generally supported, persuasive ar-

148. Bradshaw, *The "Dual-Capacity" [sic] Doctrine: Employer Tort Liability for Certain Work-Related Injuries*, MINN. TR. LAW., July 1978, at 6.

149. See *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 661-63 (6th Cir. 1979) (applying Kentucky law).

150. For example, a manufacturer of defectively designed punch presses could limit its products liability exposure by acquiring those companies that are its largest customers.

151. See *Miller v. United States*, 307 F. Supp. 932 (E.D. Va. 1969) (divisions within government shipyard); *State v. Purdy*, 601 P.2d 258 (Alaska 1979) (suit for failure to properly maintain highway on which car accident occurred); *Douglas v. E. & J. Gallo Winery*, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977) (dicta); *Walker v. City & County of San Francisco*, 97 Cal. App. 2d 901, 219 P.2d 487 (1950) (pre-*Duprey* decision, see note 1 *supra*) (member of city fire department killed when hit by city streetcar); *Osborne v. Commonwealth*, 353 S.W.2d 373 (Ky. 1962) (employee of Department of Highways hit by state trooper); *Wright v. Moore*, 380 So. 2d 172 (La. App. 1979) (employee of Department of Health sued state for malfunctioning street signal); *Bross v. City of Detroit*, 262 Mich. 477, 247 N.W. 714 (1933) (city fireman killed by city streetcar); *De Giuseppe v. City of New York*, 188 Misc. 897, 66 N.Y.S.2d 866 (Sup. Ct. 1946) (city sanitation department employee injured by city owned and operated streetcar), *aff'd mem.*, 273 A.D. 1010, 79 N.Y.S.2d 163 (1948); *Thompson v. Lewis County*, 92 Wash. 2d 204, 595 P.2d 541 (1979)

guments have been made in support of the dual-capacity doctrine. One author observed:

[A] governmental agency may have a vast number of employees and separate departments or divisions, each acting independent of the other and completely separate with respect to basic function and area of responsibility. Often an employee functioning in one department or division is injured as a result of malfeasance of another department or division, albeit on the job. Under these circumstances should the employer be shielded from tort liability by the worker's comp exclusive remedy principle?¹⁵²

In *McDonough v. Miller*,¹⁵³ a case from the First District of Minnesota, Le Sueur County, the plaintiff, an administrator for the Minnesota Department of Public Welfare, was driving alone in a state-owned vehicle. The defendant, who was driving in the opposite direction, lost control of her car and collided with plaintiff's car because of the eroded condition of the shoulder of the highway. Plaintiff, who was severely injured, brought suit against the defendant. Because the defendant's insurance policy had a liability coverage ceiling of only \$25,000, the plaintiff sued the State of Minnesota Highway Department under the dual-capacity doctrine. Although the plaintiff's medical specials came to \$15,000 and it was anticipated that the plaintiff would be able to return to work about a year and a half after the accident, the plaintiff obtained over \$75,000 as a settlement from the state in addition to workers' compensa-

(county road department employee sued for failure to properly construct and maintain county road).

In *State v. Purdy*, 601 P.2d 258 (Alaska 1979), the court stated:

Whatever frail vitality the dual capacity doctrine has in other jurisdictions, we do not think that it warrants adoption here. To do so might undermine extensively the policy sought to be achieved by the workmen's compensation act. There are endlessly imaginable situations in which an employer might owe duties to the general public, or to non-employees, the breach of which would be asserted to avoid the exclusive liability provision of our statute. It would be an enormous, and perhaps illusory, task to draw a principled line of distinction between those situations in which the employee could sue and those in which he could not. The exclusive liability provision would, in any event, lose much of its effectiveness, and the workmen's compensation system as a whole might be destabilized.

Id. at 260.

Professor Larson has stated:

One thing is clear. Dual capacity will not be found merely because the employer has a number of departments or divisions that perhaps are quite separate in their functions and operations. The question has arisen most frequently as to governments. Attempts have several times been made to subdivide a municipality, and assert common-law rights on behalf of an employee of one city department as if it were a stranger. These attempts have been consistently unsuccessful.

2A A. LARSON, *supra* note 3, § 72.80, at 14-115 to -116 (footnote omitted).

152. Bradshaw, *supra* note 148, at 6.

153. An account of this case by the plaintiff's attorney is found at Bradshaw, *supra* note 148, at 6-7; Bradshaw, *Our Members Report*, MINN. TR. LAW., June 1978, at 12, 16-18.

tion benefits and \$25,000 from defendant's insurance carrier.¹⁵⁴

The plaintiff's attorney asserted that the state settled because it feared liability under the dual-capacity doctrine. Even though the Minnesota Supreme Court has not yet applied the doctrine, the plaintiff's analysis of the case under the dual-capacity doctrine is instructive and persuasive:

First, it is clear that the function of the State of Minnesota Highway Department was separate and distinct from that of the Department of Public Welfare. These departments originate from completely different offices. The functions and purposes of the two departments are completely separate and in no way overlap. Joe McDonough was not in any way associated with the Highway Department in his employment.

As to the second criterion of the rule, it is clear that the State of Minnesota owes a duty to the public relative to the safety of its roadways. See, Minnesota State Constitution Article XIV and MSA §161.114 (requiring the state to maintain Minnesota State Highway #13 as a public highway for the purpose of providing a "reasonable means of communication"); and *Neiting v. Blondell*, 235 NW2d 597 (1975) and MSA §3.736 (on abrogation of sovereign immunity).¹⁵⁵

In respect to these principles, Joe McDonough was in an identical position with any other vehicle operator or passenger on the road. His need for a state roadway was neither more nor less than that of the remainder of the public. Another close analogy which may be drawn to the *Douglas [v. E. & J. Gallo Winery]* decision is that the roadway is in every sense a "product" which is furnished by the State to the public, just as the scaffolding furnished by defendant in the *Douglas* case was a product. When Mr. McDonough undertook his employment with the Department of Public Welfare, he naturally assumed all the hazards and risks which would normally flow from his relationship with his immediate employer, but he certainly did not foresee that his "employer" would somehow injure him through its negligence in a completely distinct capacity. Thus, in accordance with the rationale of the *Douglas* case, he should not be held to have [given] up his rights with respect to the function of the State of Minnesota as keeper of the highways.¹⁵⁶

154. Bradshaw, *supra* note 148, at 6-7.

155. The existence of a duty owed by the Department of Transportation to the plaintiff may be questioned in light of *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979), discussed in Comment, *Municipal Tort Liability and the Public Duty Rule: A Matter of Statutory Analysis*, 6 WM. MITCHELL L. REV. 391 (1980). Under *Cracraft* a statutory duty owed to the public in general without some special relationship between the plaintiff and the defendant cannot be the basis of a negligence action against the state or a municipality. See 279 N.W.2d at 806-08. Even under more traditional applications of the law of negligence per se, there might not be a statutory duty because the statute was intended to provide a reasonable means of transportation and not to protect travelers from injury. See Comment, *supra*, at 397-400. In any event, the probable absence of liability for negligently maintaining state highways in this case should not be regarded as undermining the validity of the dual-capacity doctrine in an appropriate fact situation.

156. Bradshaw, *supra* note 148, at 10-11.

Many of the same reasons that compel adoption of the dual-capacity doctrine in the corporate subdivision context also apply to the government subdivision context. Although an employee may have given up his common-law right of recovery against his immediate employing division, relinquishment of that right should not be required when the employee may not have assumed or contemplated the risks generated by other governmental divisions. Based on this unassumed-risk principle and the reasons stated above, Minnesota should adopt the dual-capacity doctrine in the government subdivision context.

G. Vendor

Michigan is the only jurisdiction that has considered the application of the dual-capacity doctrine to the situation in which the employer is also the employee's vendor.¹⁵⁷ In *Panagos v. North Detroit General Hospital*,¹⁵⁸ the plaintiff, defendant's employee, cut her mouth while eating pie purchased in defendant's cafeteria. The plaintiff received workers' compensation benefits and sued the hospital alleging that the vendor-vendee relationship created an independent ground for recovery. The *Panagos* court held that the employee was not precluded from suing her employer.¹⁵⁹

In a subsequent Michigan Court of Appeals case, *Neal v. Roura Iron Works, Inc.*,¹⁶⁰ the court dismissed plaintiff's breach of warranty suit against the defendant-employer, which sold plaintiff a glove that became caught in a drill press, as a result of which the plaintiff's right arm was amputated. The *Neal* court acknowledged that if an employer acts in several different and unrelated capacities, an employee may have two distinct remedies.¹⁶¹ The court distinguished *Panagos*, however, stating that the employee-employer relationship must be entirely unrelated or only incidentally related to the ground for the separate cause of action.¹⁶² The *Neal* court noted that the accident could not have occurred had the plaintiff not been an employee.¹⁶³ To prevent a flood of products liability suits against employers and to avoid the weakening of the exclusive-remedy provision, a suit against the employer was not allowed when the employer's separate capacity was related to the employer-employee rela-

157. There are, however, cases that discuss the issue only in a conclusory fashion. See, e.g., *De Stefano v. Alpha Lunch Co.*, 308 Mass. 38, 30 N.E.2d 827 (1941) (workers' compensation exclusive remedy for adulterated food served to restaurant employee when the employee made no reservation of common-law rights).

158. 35 Mich. App. 554, 192 N.W.2d 542 (1971).

159. *Id.* at 559, 192 N.W.2d at 544.

160. 66 Mich. App. 273, 238 N.W.2d 837 (1975).

161. *Id.* at 276 n.2, 238 N.W.2d at 838 n.2.

162. *Id.* at 277-78, 238 N.W.2d at 840.

163. *Id.* at 278, 238 N.W.2d at 840.

tionship.¹⁶⁴

Neal and *Panagos* may be reconciled according to principles discussed earlier in this Note. In *Panagos* the defendant was in the business of running a hospital as well as a hospital cafeteria. Allowing the plaintiff to sue her employer is consistent with the dual-capacity doctrine under *Douglas v. E. & J. Gallo Winery*¹⁶⁵ and *D'Angona v. County of Los Angeles*.¹⁶⁶ Those cases recognized that the dual-capacity doctrine will apply only if the employer is in the business of supplying the injury-causing goods or services.¹⁶⁷ In contrast, the employer in *Neal* was not in the business of selling gloves and therefore under the *Douglas* and *D'Angona* rules the dual-capacity doctrine does not apply.

Many of the policy reasons used to justify the dual-capacity doctrine in the products liability setting also may be used to justify it in the vendor-vendee context. When an employer sells a product to an employee a new relationship is created. Vendors of products have a duty to supply nondefective goods.¹⁶⁸ Even if the vendor is not the manufacturer of the goods, the vendor is still liable to the vendee for defective goods that cause injuries¹⁶⁹ because a vendor gives an implied warranty of fitness when a product is sold.¹⁷⁰ In addition, public policy dictates that consumers should not be required to bear the loss when a manufacturer cannot be found or is judgment proof because the vendor is in a better position to distribute the costs of an injury.

When the vendor-vendee relationship is merged with the employer-employee relationship, the policies that require vendor liability clash with the employer immunity provided by workers' compensation statutes. The reasons for imposing liability on the employer-vendor for the sale of defective products are not as compelling as the reasons for imposing liability when the employer also manufactures the product. The imposition of liability on a vendor of a defective product does not substantially further the public's interest in deterring the manufacture of such products. If the defect is not readily discoverable, the employer-vendor is unable to protect against defective products. The consumer-employee, however, relies upon the implied representations of the employer-vendor that the product is safe.

Even though workers' compensation benefits reduce the amount of an employee's loss, those benefits usually do not provide full compensa-

164. *Id.*

165. 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

166. — Cal. 3d —, 613 P.2d 238, 166 Cal. Rptr. 177 (1980).

167. See notes 34-43, 112-15 *supra* and accompanying text.

168. See generally Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

169. *Id.*

170. *Id.*

tion.¹⁷¹ Therefore, the issue of liability turns on who should or is best able to bear the loss, the employer-vendor or the employee-vendee. Because an employer-vendor normally is better able to spread the cost of such losses by charging higher prices, an employer-vendor should bear the loss.¹⁷² Consequently, Minnesota should adopt the dual-capacity doctrine in the employer-vendor context.

H. Statutory Duty

Only three courts have discussed the conflict that occurs when the exclusive-remedy provision of a workers' compensation statute prevents a lawsuit against an employer although another statute allows such a suit.¹⁷³ In *Mazurek v. Skarr*,¹⁷⁴ the plaintiff, a national guardsman, was injured as a result of the negligence of another guardsman. The plaintiff sought recovery under both the workers' compensation statute and under a Wisconsin statute requiring the state to pay a judgment entered against a guardsman acting in good faith. The Wisconsin Supreme Court allowed recovery under both statutes, stating that "[t]he state is herein wearing two hats, that of employer and that required of it under [the statute]."¹⁷⁵

A New York court, however, took a different view. In *Naso v. Lafata*,¹⁷⁶ the plaintiff was injured in an accident while being driven home in a car owned by the defendant-employer. The plaintiff received workers' compensation benefits. The *Naso* court held that the workers' compensation statute was the only remedy available, notwithstanding a New York stat-

171. See note 12 *supra*.

172. It could be argued that the implied warranty of a vendor is subsumed under the implied warranty of an employer to provide a safe place to work and to provide safe working materials. Since a vendor cannot be deterred from manufacturing defective products and since there would be no independent duty upon a vendor-employer to supply safe working materials, it is arguable that the dual-capacity doctrine should not apply.

173. In Illinois a long line of cases held that an employee who recovers under the workers' compensation act cannot sue his employer under the Illinois Structural Work Act (which establishes a standard of care for the erection and maintenance of scaffolding, see note 123 *supra*). See *Smith v. Metropolitan Sanitary Dist.*, 77 Ill. 2d 313, 396 N.E.2d 524 (1979); *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 359 N.E.2d 125 (1976) (workers' compensation act grants immunity to immediate employers only, not someone who is required to pay under the act); *Gannon v. Chicago, M., St. P. & P. Ry.*, 13 Ill. 2d 460, 150 N.E.2d 141 (1958); *Carey v. Coca-Cola Bottling Co.*, 48 Ill. App. 3d 482, 363 N.E.2d 400 (1977); *Kim v. Raymond*, 44 Ill. App. 3d 37, 358 N.E.2d 34 (1976); *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 354 N.E.2d 553 (1976); *Dintelman v. Granite City Steel Co.*, 35 Ill. App. 3d 509, 341 N.E.2d 425 (1976). But see *Marcus v. Green*, 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973) (duty imposed under the Structural Work Act is separate from an employer's duty under the workers' compensation act). For a discussion of *Marcus*, see notes 122-24 *supra* and accompanying text.

174. 60 Wis. 2d 420, 210 N.W.2d 691 (1973).

175. *Id.* at 427, 210 N.W.2d at 694.

176. 4 N.Y.2d 585, 152 N.E.2d 59 (1958).

ute imposing liability on the owner of a vehicle for the negligence of any person operating the vehicle with the owner's permission.¹⁷⁷ The court stated that to hold otherwise would be to disregard the exclusive-remedy provision of the statute.¹⁷⁸

Even though the duty is imposed by statute as opposed to the common law the difference is not important to the operation of the dual-capacity doctrine. The essential question still is whether the statutory duty arises independent of the employer-employee relationship. Although the bare language of the statute is available for interpretation, statutory language can be just as amorphous as any common-law principle.

It is difficult to draw any conclusion from *Mazurek* and *Naso*. The underlying principle, however, appears to be that if the essential purpose of the statute would be thwarted, the exclusive-remedy provision will be preempted. For example, in *Mazurek*, the court held that to allow the exclusive-remedy provision to exempt the state from liability would be contrary to the express language of the statute. In contrast, the statute in *Naso* was a general liability statute that would give way under general rules of statutory construction to the more specific workers' compensation statute. In short, the dual-capacity doctrine in the statutory context becomes a matter of statutory interpretation. Because the duties imposed by statutes are varied, it is impossible to reach any general conclusion on the applicability of the dual-capacity doctrine.

IV. PROCEDURAL ISSUES

If the dual-capacity doctrine is applied, the issue arises whether an employer is entitled to a setoff from any common-law recovery in the amount of workers' compensation benefits paid or payable. Every jurisdiction that has addressed this question has required a setoff.¹⁷⁹ This requirement is based on the principle that a party should not be entitled to a double recovery.¹⁸⁰

The California Supreme Court in *D'Angona v. County of Los Angeles*¹⁸¹ held that a county hospital employee could sue the county for the aggravation of injuries received in the course of employment. The court stated, "[t]herefore, to the extent that the award made in her favor by the Worker's Compensation Appeal Board reflects benefits afforded for

177. *Id.* at 590-91, 152 N.E.2d at 61-62.

178. *Id.*

179. *Barber v. New England Fish Co.*, 510 P.2d 806, 813 & n.39 (Alaska 1973); *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 636, 498 P.2d 1063, 1077-78, 102 Cal. Rptr. 815, 829-30 (1972); *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 447, 359 N.E.2d 125, 130 (1976); *Neal v. Roura Iron Works, Inc.*, 66 Mich. App. 273, 276 n.2, 238 N.W.2d 837, 839 n.2 (1975).

180. *See* note 179 *supra*.

181. — Cal. 3d —, 613 P.2d 238, 166 Cal. Rptr. 177 (1980).

the aggravation of her injuries . . . the county is entitled to a set-off"¹⁸²

In *Barber v. New England Fish Co.*,¹⁸³ an injured longshoreman collected workers' compensation benefits and brought a common law action alleging that his injuries were caused by a vessel's unseaworthiness. The Alaska Supreme Court stated that if benefits are paid by one insurer and the judgment is paid by another insurer, the employer can retain from the judgment any funds necessary to reimburse the compensation carrier.¹⁸⁴ Under Alaska law, a common-law judgment is the primary source of funds out of which damages to an injured worker are to be paid, while workers' compensation benefits are a secondary source. This is consistent with the employee not needing to establish negligence to recover workers' compensation benefits. The party proven to be at fault logically should be the primary bearer of the employee's loss.

V. CONCLUSION

The essential aim of the dual-capacity doctrine is to prevent injured employees from receiving less protection from the law than does the general public merely because they are employees. For this reason, the dual-capacity doctrine should not be viewed as a devastating inroad into the workers' compensation scheme.

Several general rules consistently appear in the dual-capacity decisions. An employee who suffers an injury that arises out of and in the course of employment may both sue the employer for those injuries and collect workers' compensation benefits only if that employer is in the business of supplying the injury-causing product or service to the public in general. This rule, however, does not apply in the corporate and governmental subdivision contexts or in the statutory context. In cases in which the employer is a corporate or governmental subdivision, the dual-capacity doctrine always should apply because of the unassumed-risk principle. In the statutory context, the dual-capacity doctrine should apply only if the essential purpose of the statute would be subverted by the exclusive-remedy provision. By reducing the employer's opportunity to avoid full economic responsibility through the exclusive-remedy provision, the dual-capacity doctrine returns a workers' compensation statute to its status as a compensation law rather than a grant of employer immunity.

182. *Id.* at —, 613 P.2d at 243, 166 Cal. Rptr. at 182.

183. 510 P.2d 806 (Alaska 1973).

184. *Id.* at 807, 813 & n.13.